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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1447

ODELL ANDREWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I

The use against petitioner Andrews of of out-of-court statements of co-defendant Griffin made out of the presence of petitioner was prejudicial error and in violation of his right to confrontation of witnesses under the sixth amendment and due process of law and the fifth amendment to the Constitution of of the United States. 16

II

The introduction of the prior felony conviction of petitioner Andrews, which at the time of trial was on appeal on the basis of Leary v. United States, 89 S. Ct. 1532, and

Covington v. United States, 395, U.S. 57, was a prejudicial error in violation of due process of law and the Fifth Amendment to the Constitution of the United States. Due to conflicting decisions in the Courts of Appeal, this Court should resolve this issue with clarity. 21

III

The Government's use of Petitioner's prior felony conviction to discredit him as a witness and insure his conviction through the guise of impeachment denied him the fair trial guaranteed to him by the Sixth Amendment to the United States Constitution. Moreover, it constituted a denial of his right to due process and equal protection of the laws as protected by the Fifth Amendment. 27

The evidence used to convict Petitioner was obtained through an illegal search and seizure, to wit, an unauthorized telephone tap. Without that evidence there could have been no conviction. Thus, the case should be reversed and dismissed forthwith.....44

By permitting the trial jury to convict Petitioner of manipulating

heroin which, in order for him to be guilty, must have in fact been imported into this country contrary to law with the petitioner's knowledge, upon a mere showing of possession in a friend or confederate is violative of the due process clause of the United States Constitution. 50

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IN THE

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October Term, 1971

No._____

ODELL ANDREWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, Odell Andrews, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment of the United States District Court for the Central District of California, sentencing petitioner to ten years imprisonment.

OPINION BELOW

Trial in the Federal District Court was by jury.

The opinion of the Court below is appended hereto as Appendix "A", and is also found in the Clerk's Record of the Circuit Court. The opinion of the Court below is, as yet, not reported. The Judgment of the court below is contained in the Clerk's transcript from the Circuit Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is November 27, 1970 (R.C.A. Judgment).

A Petition for Rehearing was denied on January 6, 1971.

A Petition for an extension of time within which to lodge a Petition for a Writ of Certiorari with This Court was granted and the time for filing said Petition was extended until March 6, 1971.

The statutory provision believed to

confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254 (9).

QUESTIONS PRESENTED FOR REVIEW

I

THE USE AGAINST PETITIONER ANDREWS OF OUT-OF-COURT STATEMENTS OF CO-DEFENDANT GRIFFIN MADE OUT OF THE PRESENCE OF PETITIONER WAS PREJUDICIAL ERROR AND IN VIOLATION OF HIS RIGHT TO CONFRONTATION OF WITNESSES UNDER THE SIXTH AMENDMENT AND DUE PROCESS OF LAW AND THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II

THE INTRODUCTION OF THE PRIOR FELONY CONVICTION OF PETITIONER ANDREWS, WHICH AT THE TIME OF TRIAL WAS ON APPEAL ON THE BASIS OF LEARY V.

UNITED STATES, 89 S.Ct. 1532, AND COVINGTON V. UNITED STATES, 395 U.S. 57, WAS A PREJUDICIAL ERROR IN VIOLATION OF DUE PROCESS OF LAW AND THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. DUE TO CONFLICTING DECISION IN THE COURTS OF APPEAL, THIS COURT SHOULD RESOLVE THIS ISSUE WITH CLARITY.

III

THE GOVERNMENT'S USE OF PETITIONER'S PRIOR FELONY CONVICTION TO DISCREDIT HIM AS A WITNESS AND INSURE HIS CONVICTION THROUGH THE GUISE OF IMPEACHMENT DENIED HIM THE FAIR TRIAL GUARANTEED TO HIM BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION. MOREOVER, IT CONSTITUTED A DENIAL OF HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AS PROTECTED BY THE FIFTH AMENDMENT.

IV

THE EVIDENCE USED TO CONVICT PETITIONER WAS OBTAINED THROUGH AN ILLEGAL SEARCH AND SEIZURE, TO WIT, AN UNAUTHORIZED TELEPHONE TAP. WITHOUT THAT EVIDENCE THERE COULD HAVE BEEN NO CONVICTION. THUS, THE CASE SHOULD BE REVERSED AND DISMISSED FORTHWITH.

V

BY PERMITTING THE TRIAL JURY TO CONVICT PETITIONER OF MANIPULATING HEROIN WHICH, IN ORDER FOR HIM TO BE GUILTY, MUST HAVE IN FACT BEEN IMPORTED INTO THIS COUNTRY CONTRARY TO LAW WITH THE PETITIONER'S KNOWLEDGE, UPON A MERE SHOWING OF POSSESSION IN A FRIEND OR CONFEDERATE IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

Geraldine Griffin and Odell Andrews were charged in one indictment having ten counts based on four alleged sales of narcotic occurring on March 3, 1969; March 20, 1969; March 27, 1969; and April 3, 1969. Griffin was charged in each count; Petitioner was only named in Count Ten. Counts One through Three deal with the March third transaction. Count One alleged a violation of 21 U.S.C. 174 for receiving, concealing or facilitating concealment and transportation of the narcotic. Count Two alleged a violation of 21 U.S.C.174 for selling and facilitating the sale of the narcotic. Count Three alleged a violation of 26 U.S.C. 4705(a). Counts Four through Six follow the same pattern with respect to the March 20 transaction. Counts Seven through Nine follow the same pattern for the March 27th transaction. Count Ten charged a violation of 21 U.S.C. 174 for receiving, concealing and facilitating the concealment and transportation of the narcotic involved therein.

Petitioner moved to sever his trial from that of Griffin, based on Bruton v. United States, 391 U.S. 123 (1968). This motion was granted, with the court to try the case as to Griffin first - to be followed by Petitioner's case. (CT[1] 46.) Both trials were before a jury. Both trials resulted in conviction on all applicable counts. (CT 99, 109.) Griffin received a five year sentence and Petitioner a ten year sentence (RT 1062-3).

After timely filing of appeals by both Griffin and Andrews, the 9th Circuit Court of Appeals affirmed the judgments on November 27, 1970. A Petition for Rehearing was denied on January 6, 1971.

After a change of attorneys and a continuance was granted within which to file a Petition seeking Certiorari, this brief was timely filed.

STATEMENT OF FACTS

The case is marked by a conflict as to many fundamental facts. Essentially, the relevant facts describe a series of four sales of heroin by one Geraldine Griffin to undercover agent Henry, arranged by Simmons, an informant. It is alleged that Petitioner participated in the last of these sales. Simmons had been arrested for a narcotics offense (sale of cocaine) in December 1968 by Agent Barnes (RT 258). He was told by the agents that he needed to give information leading to some kind of transaction in which an agent could make another arrest, in order to have his cooperation brought to the attention of the government (RT 260). He cooperated on two such deals (RT 259, 165), and his cooperation was brought to the attention of the authorities (RT 260).

The first arranged sale took place on March 3, 1969. The informant, Simmons, and Griffin arranged to meet at Venice and Western Avenue, in the Newberry Department Store parking lot (RT 451). Griffin testified that

she then met David, her source, and picked up the heroin, which she concealed in her clothing (RT 366,369). She then went to meet Simmons and received a ride from Petitioner in his 1968 Cadillac. She found Simmons by the Queen Bee Restaurant near the parking lot (RT 370). Simmons introduced Agent Henry to Griffin at his car as the man who wanted the heroin (RT 371). There was a transfer of the heroin for money (RT 372). Griffin was then given a ride by Petitioner to Fifteenth and Wilton Avenue, to Dave's apartment. The agents working on surveillance observed the Cadillac pull into the lot, driven by a Negro male (RT 220). The driver walked to the Queen Bee Restaurant and, after the sale by Griffin, was met by her in the restaurant (RT 270). In fifteen minutes the two left (RT]]0). A subsequent analysis of the substance transferred revealed it was heroin (RT 137).

a purchase (RT 377). Griffin said she would let him know, and called Dave (RT 378). She called Simmons, but he wasn't in (RT 379). She had no further contact with Simmons. Agent Henry, however, called her after Simmons had informed the agents on March 19th of a possible second sale (RT 183). Agent Henry told Griffin that Simmons had told him to call her concerning the sale (RT 382). Agent Henry called her a second time, and then a third time on March 20th (RT 382-383). They arranged to meet at Newberry's in the Venice Parking Center (RT 385). Griffin then went to Dave's apartment to obtain the heroin (RT 383). Griffin testified that she then took a bus to the arranged rendezvous (RT 385,316). The agents testified that Griffin arrived at the lot in a Mercury automobile and walked to Agent Henry's car (RT 138-139). Agent Barnes had been on surveillance at Fifteenth Street and testified that when he was informed by radio that Griffin had arrived in a Mercury, he left

a purchase (RT 377). Griffin said she would let him know, and called Dave (RT 378). She called Simmons, but he wasn't in (RT 379). She had no further contact with Simmons. Agent Henry, however, called her after Simmons had informed the agents on March 19th of a possible second sale (RT 183). Agent Henry told Griffin that Simmons had told him to call her concerning the sale (RT 382). Agent Henry called her a second time, and then a third time on March 20th (RT 382-383). They arranged to meet at Newberry's in the Venice Parking Center (RT 385). Griffin then went to Dave's apartment to obtain the heroin (RT 383). Griffin testified that she then took a bus to the arranged rendezvous (RT 385,316). The agents testified that Griffin arrived at the lot in a Mercury automobile and walked to Agent Henry's car (RT 138-139). Agent Barnes had been on surveillance at Fifteenth Street and testified that when he was informed by radio that Griffin had arrived in a Mercury, he left

Fifteenth Street to follow the Mercury (RT 224). He followed the Mercury for five to ten minutes and was informed by radio that a green and white Cadillac had appeared on the lot (RT 224). He immediately returned to the lot and, as he arrived, Agent Henry was leaving (RT 225). Agent Barnes testified that he then followed the Cadillac to the apartment on Fifteenth Street (RT 225). Agent Henry testified that Griffin walked to his car and said she did not have the heroin but would have to call her supplier (RT 140). They went into the Queen Bee Restaurant and, according to Agent Henry, she made a telephone call, after which she told him the source was on his way (RT 140). Agent Henry testified that there was a conversation concerning the purchase of an ounce of heroin and that Griffin asked whether he wanted a "street ounce" or a "pure ounce" and explained the difference (RT 140). Griffin testified that she had no such conversation and that she never stated she had to obtain the heroin from someone else (RT 386). Agent Henry

went on to testify that a green Cadillac arrived in the lot and Griffin announced, "There is my man now"; she then went to the car, drove from the lot, returning a few minutes later with the heroin (RT 141). The sale then occurred. A test of the substance revealed it was heroin (RT 142). Griffin testified that she did not go to a Cadillac and that Agent Henry gave her a ride home (RT 388,390).

A third transaction took place on March 27th. On March 26, Griffin and Agent Henry had arranged to meet at the corner of Sixth Street and Santa Barbara in Los Angeles (RT 148,392). After the meeting Agent Henry drove Griffin to a pay telephone so that she could call her supplier. She testified that she then called Dave and he asked her to call back (RT 393). Agent Henry and Griffin then went to the Queen Bee Restaurant where Griffin made a second call to Dave (RT 393,148). David said he couldn't get the quantity requested, and Griffin and Agent Henry agreed to try on the 27th (RT 393,

148). Agent Henry then drove Griffin home (RT 394). Agent Henry called Griffin on March 27th (RT 150,394). They agreed to meet in the Newberry parking lot (RT 398). Griffin went to Dave's apartment to pick up the heroin (RT 398) and borrowed a Rambler automobile to meet Agent Henry (RT 399-400). Agent Henry and the surveillance officers observed her as she drove into the Newberry lot in the Rambler and walked to Agent Henry's car (RT 147,226-227). Griffin then took the heroin out of her clothing and gave it to Agent Henry for $325.00 (RT 147). Agent Henry said he would want to order three ounces of heroin in a few days (RT 147). Agent Barnes testified that he then followed Griffin to the apartment house on Fifteenth Street (RT 227).

The fourth alleged sale took place on April 3, 1969. Agent Henry telephoned Griffin on April 2, 1969 concerning the purchase of three ounces of heroin. According to his testimony, Griffin said she would have to contact her man and call back (RT 201,209, 781-783). On April 3, 1969, Agent Henry

called her again (RT 210). Griffin said she would call back with the information about where to meet (RT 153). Griffin called her source of supply, David, and discussed the procedure for carrying out the transaction (RT 318). When Griffin returned the call, Agent Henry was not in. She called a second time, at 10:00 a.m., and told him to meet her at the Midtown Shopping Center (RT 153,317,572-573,784). Griffin apparently told Agent Henry that this was the last transaction (RT 321). Griffin borrowed a 1969 Rambler Rebel from Cordelia, a friend of hers who was Odell Andrews' common-law wife (RT 903). Petitioner testified that he and Cordelia had had an argument the night before and he went to see a friend (RT 929-930). He also testified that he had rented the Rambler for Cordelia (RT 932). The Government established that he did, in fact, rent the car (RT 761,796,932). Griffin obtained the telephone number from Cordelia of the friend with whom Petitioner

was staying, and called him (RT 903). She testified that she wanted the moral support of having someone she knew present, and she asked Petitioner if he could buy some dog food for her at the Safeway market, which was around the corner from the friend's house (RT 905). Petitioner agreed, and he went to the market to buy the dog food and steak and eggs for himself (RT 930-931). Griffin never discussed heroin with Petitioner, but used the dog food as a pretext to get him to the market (RT 907). Griffin picked up the heroin from David and went to the Midtown Market (RT 906). Agent Henry waited forty-five minutes and then left for the market (RT 153-154). They met at the market, and Griffin commented about his being late (RT 830). According to the testimony of Agent Henry, Griffin told him to follow her to the Safeway Market and he relayed the information to the other agents, through another agent on the lot (RT 154,579,830). Griffin testified that, on Dave's orders,

she merely told him to follow without divulging the destination (RT 407,903). The agents observed Griffin driving the Rambler (RT 580). Agent Henry did not include in his report that he had relayed the information on the destination (RT 277). Agent Carter, who testified by chance-only because he had witnessed Petitioner sign a handwriting exemplar, was not mentioned in the agent's reports (RT 815). Agent Carter testified that he had known after the phone calls that morning that he was to proceed to the Safeway Market (RT 813).

Agent Henry testified that he parked approximately sixty to seventy-five feet from the entrance of the Safeway Market (RT 594). He was actually 140-160 feet from the door (RT 888). Agent Henry testified that Griffin came to his car and they talked (RT 155,580). She looked to the store and said, according to Agent Henry's testimony, that she saw her man and pointed at Petitioner, who was standing near the

door of the market (RT 155,580,831). Agent Henry further testified that Griffin went to Petitioner and that Petitioner handed her a large sack (RT 156,581,831). Agent Coonce testified that as Griffin approached, Petitioner turned toward the door of the market, bent down and turned around with a bag of groceries (RT 606). Agent Henry testified that there were no cars directly in front of the supermarket to block his view, but he later admitted that there were some (RT 890). After obtaining the paper bag, Griffin then returned to Agent Henry's car.

Griffin testified that she was a bit wary of Agent Henry and had gone to the Safeway store to buy cigarettes (RT 411,902); she did not point to Petitioner or say "There is my man." As she walked by Petitioner he asked why she had wanted him to come, and she said she would tell him later (RT 902). She walked into the market to buy cigarettes and removed from her clothing the heroin she had received from David (RT 902). She then

picked up out of the shopping cart the sack of groceries which Petitioner had bought for her and put the heroin in the sack. She then returned to Agent Henry's car (RT 412,902). Agent Carter, who was seventy-five feet from the market, testified that Griffin walked up to Petitioner and they both went into the supermarket and exited shortly thereafter; Griffin was carrying a brown paper bag (RT 804). Agent Carter and Agent Coonce testified that they had been told to watch Petitioner prior to the meeting with Griffin (RT 612,805).

Agent Henry testified that once Griffin had returned to his car, she placed the paper sack on the floor of the car, had reached in and given him a condum filled with heroin (RT 156,581). His report states that the heroin was wrapped in a clear plastic bag (RT 588). Agent Henry testified that he then went to the back of his car, ostensibly to get the money, and gave the signal for arrest (RT 228,582). Griffin testified that

she did not hand Agent Henry the heroin, because David had told her not to let him see the heroin on her person. According to her testimony, the agent reached into the bag and took the heroin, and then he put her under arrest (RT 920).

The signal to arrest, given by Agent Henry, was to initiate the arrest of Griffin and anyone with whom she came in contact, "no matter what the contact was" (RT 590). Agents Coonce and Barnes, with Agent Carter, arrested Petitioner. At the time of arrest, Agent Carter heard someone say to Petitioner, "Don't take your hands off the shopping cart"; he saw a bag of groceries containing steak and eggs.

Agent Barnes testified that he had kept surveillance on a 1968 Coupe de Ville Cadillac parked a block east of the market (RT 629). Petitioner testified that he had parked the car there the night before when he came to visit his friend (RT 929-930).

The substance transferred by Griffin contained heroin. The Government chemist

testified that it is possible to convert morphine into heroin through a simple chemical process involving the addition of Acetic Anhydride. He testified that he could not tell whether the heroin in this transaction was produced in this manner (RT 297,669,673). Morphine is made legally in the United States (RT 672). He testified that Brown heroin, as in this case, can be made from crude morphine and is so produced by some illicit manufacturers (RT 673).

I

THE USE AGAINST PETITIONER ANDREWS OF OUT-OF-COURT STATEMENTS OF CO-DEFENDANT GRIFFIN MADE OUT OF THE PRESENCE OF PETITIONER WAS PREJUDICIAL ERROR AND IN VIOLATION OF HIS RIGHT TO CONFRONTATION OF WITNESSES UNDER THE SIXTH AMENDMENT AND DUE PROCESS OF LAW AND THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The prosecution, at trial, introduced against Petitioner highly accusatory statements allegedly uttered by co-defendant Griffin during the negotiations concerning the sale of heroin. These statements were vigorously objected to by counsel for Petitioner (RT 572ff).

In essence, on a couple of occasions, Griffin reportedly said at the scene of a narcotic sale pointing toward a person either identified as Andrews or a person driving a car associated with him, "There is my man now"

(RT 141; see also RT 155,580,831).

It is fundamental conspiracy law that the defendant must have been shown to have been a conspirator prior to his assuming any responsibility for statements made by his cohorts pursuant to that conspiracy. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942). Petitioner contends (a) that there was no proof of a conspiratorial arrangement existing at the time the statements were made which were admitted in evidence against him, and (b) that the Court should have made an independent determination as to whether a conspiracy had been proved antedating the statements rather than subject the jury to the bewildering task of ascertaining the onset of the conspiracy without reference to the statements admitted; and if a conspiracy was in fact found to pre-exist the remarks, then consider them as evidence against Petitioner as a co-conspirator.

Let us first discuss the frailties in the prosecution's case insofar as the proof of a conspiracy is concerned. In United States

v. Ragland (2nd Cir. 1967), 375 F. 2d 471, the age-old proposition that mere association with a criminal does not make one a partner in his enterprise was stated. In the present case, the only evidence relating to Petitioner prior to the out-of-court declarations of the co-defendant was that Griffin had borrowed his common-law wife's car and that he was present in the vicinity of a transaction. This clearly was not enough to bring the dreaded conspiracy doctrine with all of its prosecutorial orientation into operation.

Secondly, the Court left to the jury the decision as to when a conspiracy came into being, instructing them to disregard the co-defendant's out-of-court references to Petitioner for purposes of making that determination and then allowing them to consider such evidence if they determined that the conspiracy was in motion when the statements were uttered (RT 1029-30). This error is of the same genre and is replete with the same evils as that condemned by this Court in Jackson v. Denno, 378 U.S.368,

84 S.Ct. 1774 (1964). Defense counsel at trial envisioned the need to apply the Jackson doctrine when he stated:

> "The court allows the Government to say there is a scheme; then prove the scheme by the statements; and then tell the jury that they should disregard the statements unless a scheme has been proved." (RT 955-56).

The Court rejected the analogy and proceeded to turn over to the jury the function of determining when the conspiracy or common scheme and design was formed (RT 1029-30). As in Jackson v. Denno, supra, the evil was that the jury would not be able to forget what they had heard for one purpose and remember it for another. See People v. Aranda, 63 Cal.2d 518,524-26,528-31 (1965). And since it concerned an out-of-court declaration by a co-defendant implicating Petitioner, the statement was condemned by this Court's decision in Bruton v. United

States, 391 U.S.123, 88 S.Ct.1620 (1968) unless there was a clear judicial ruling that the conspiracy preceded the statements, which alone could render them admissible.

Reflecting the grave concern the 9th Circuit Court of Appeals expressed over this contention, we quote from the opinion rendered by that Court:

> "Finally, although we are mindful of the danger that a jury, in violation of its instructions, may consider the out-of-court statements as well as the independent evidence in determining the preliminary fact of the existence of a common scheme or plan, we believe that any change in the allocation of existing functions between judge and jury must await direction from the Supreme Court." (pages 13-14 of opinion below)

Petitioner beseeches this Court to undertake that task now!

II

THE INTRODUCTION OF THE PRIOR FELONY CONVICTION OF PETITIONER ANDREWS, WHICH AT THE TIME OF TRIAL WAS ON APPEAL ON THE BASIS OF LEARY V. UNITED STATES, 89 S.Ct. 1532, AND COVINGTON V. UNITED STATES, 395 U.S. 57, WAS A PREJUDICIAL ERROR IN VIOLATION OF DUE PROCESS OF LAW AND THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. DUE TO CONFLICTING DECISIONS IN THE COURTS OF APPEAL, THIS COURT SHOULD RESOLVE THIS ISSUE WITH CLARITY.

The Government introduced evidence of a prior conviction of Petitioner Andrews which was over objection by the defense (RT 558-559;681;1059). The question of admissibility of a prior felony conviction which is on appeal is not settled among

the federal courts.[3] See 16 ALR 3rd Cir. 726 ff. The precise question of the admissibility of such a prior conviction over objection had not been considered by the Ninth Circuit. In Bloch v. United States, 238 F.2d 631 (9th Cir. 1956),226 F.2d 189 (9th Cir. 1955), the leading case in the Ninth Circuit, the court considered the issue of the "good faith of the prosecutor in asking the question" (226 F.2d at 188 ff). Defense counsel made no objection to the question "Have you ever been convicted of a felony" and made no motion to strike it (at 188). Defendant was thus limited on appeal to attack the good faith of the Assistant U.S. Attorney in asking the question and did not make a direct attack on the

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3 The court of appeals of Washington,D.C. holds the admission is error, Fenwick v. United States,252 F.2d 126 (D.C.1957); the Second Circuit has held it is not error when the prior conviction is subsequently affirmed,United States v. Owens,211 F.2d 426 (2nd Cir.1959);the Seventh Circuit has held the inquiry proper,United States v. Empire Packing,174 F.2d 16 (7thCir. 1949);the Fifth Circuit has not decided the question but disposed of the question on other grounds,Riggs v.United States,280 F.2d 755(5thCir.1960);the Eighth Circuit in dicta affirmed the "majority view",Newman v.United States,331 F.2d 972 (8th Cir.1964).

admissibility. The issue thus resolved itself to whether "the prosecutor was justified in concluding that it was a permissible question sanctioned by law" (226 F. 2d at 188). The court concluded:

> "...an attorney familiar with the state of the law, as we must assume the Assistant U.S. Attorney was, could very reasonably conclude that the question was proper and be well within the bounds of propriety in asking it.
>
> "Counsel representing appellant at the trial must have thought the question proper, because he made no objection to it, nor did he move to strike. In fact, on redirect examination appellant's counsel brought out the character of the crime for which appellant had been convicted and the fact that an appeal was pending. (226 F.2d at 188.)

In Bloch v. United States, supra, 238 F.2d 631 (9th Cir.1956), the court considered an appeal from an order denying a motion for new

trial of the earlier case. The court reiterated the holding of the previous case but did not generalize the applicability (238 F.2d at 632).

In the instant case, as in Bloch, the prior conviction was reversed on appeal.

Unlike Bloch, however, the defendant objected to the admission of the evidence and did not subsequently bring out the character of the crime. Moreover, the appeal of the prior conviction of Petitioner Andrews was based on Leary v. United States, supra. In the companion case to Leary, Covington v. United States, supra (395 U.S. at 59, note 2), the United States Supreme Court held that a dismissal based on the Fifth Amendment privilege enunciated in Leary was a plea in bar. The Petitioner contends that the admission of a prior felony conviction, at least in the case in which a properly sustained pretrial motion would have been a plea in bar, is prejudicial error.

The extent of possible prejudice was realized by both the judge and the prosecutor in the trial of the instant case:

> "THE COURT: All I am saying is that if the--if it appears clear cut that the case falls within the Leary decision, then I would not allow it to be used because it is obvious it is going to be reversed and it should not be used. You would have to agree with that, Mr. Nobles [the Assistant U.S. Attorney].
>
> "MR. NOBLES: That is correct, your Honor."
>
> (RT 682-683)

Of course, Andrews' conviction was reversed by the Circuit court (No. 22995,opinion filed May 11, 1970). cf. Burgett v. Texas, 389 U.S. 109,115,88 S.Ct. 258 (1967).

In view of the fact that there is a clash between the Circuits on the question of whether a felony still on direct appellate review may be utilized by the prosecution

to impeach a defendant and the increasing number of appeals which visit our Courts, this question cries out for instant attention and resolution.

III

THE GOVERNMENT'S USE OF PETITIONER'S PRIOR FELONY CONVICTION TO DISCREDIT HIM AS A WITNESS AND INSURE HIS CONVICTION THROUGH THE GUISE OF IMPEACHMENT DENIED HIM THE FAIR TRIAL GUARANTEED TO HIM BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION. MOREOVER, IT CONSTITUTED A DENIAL OF HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AS PROTECTED BY THE FIFTH AMENDMENT.

A

The Denial of a Fair Trial.

During the defense phase of the case, the Petitioner offered himself as a witness (RT 924). After giving a credible account of his activities on the date in question, he was impeached by virtue of the Government bringing to the attention of the jurors a

prior felony conviction. (RT 950) Needless to say, he was not on trial for some prior misconduct, felonious or otherwise, but rather for violating the Narcotics laws; and needless to say, the concession to being a felon bolstered immeasurably the Government's otherwise tenuous case, although the type of felony perpetrated was not related to the jury. The fact that he was a criminal and probably a narcotics violator, by virtue of his associations, helped remove the impediments to conviction.

Counsel for Petitioner vigorously objected (RT 558-59,681,1059) and only after learning that the Trial Court was going to permit the impeachment, did he offer to withdraw his objection upon the condition that the felony (a narcotics violation) not be designated (Ct.of Appeals Op. 14-16). The 9th Circuit Court of Appeals regarded this reluctant maneuver as a waiver of any objection to the use of the prior (ibid.) To the contrary, counsel was merely seeking

to make the best of a bad situation. Faced with the alternative of having his defense against involvement in narcotics doomed by virtue of having his client's past conviction for the same crime paraded before the jury, he chose an in-between course in the hopes of mitigating the damage done and succeeded to that very limited extent. It is submitted that this issue should not be bypassed on a theory of waiver. Certainly Petitioner or his counsel is not required to invoke a childish ostrich-like refusal to face facts and with unreasoning pertinacity bury his head in the sand in protest and suffer inevitable conviction, but is permitted to employ all available tactical means to assuage the injuries inflicted. cf. United States v. Ballard, 322 U.S.78,84-5 (1944)*

* The case relied upon by the Court of Appeals to establish "waiver", United States v. Hoffa (7th Cir.1966) 367 F2d 698,713,714, involved a situation where no objection was ever entered; in fact, trial counsel used the impeaching question to his advantage. Pointing out that the case was on appeal, he maintained that the Government by bringing it up exhibited a lack of confidence in both the Tennessee conviction (the prior) and the instant prosecution.

The practice of impeaching a defendant in a criminal action by his prior convictions has been criticized by thoughtful legal scholars. See, for example:

McCormick, Evidence, Section 43 (1954);

Borchard, Convicting the Innocent, 158-64 (1932);

Ladd, Credibility Tests - Current Trends, 89 University Pa. L.Rev. 166, 184 (1940);

Note, 70 Yale L.J. 763, 774-78 (1961);

Note, 78 Harv. L. Rev. 426, 440-42 (1964);

Note, 19 Hast. L.J. 919 (1968).

On the issue of credibility, evidence of the prior misconduct of any witness is generally very weak evidence. It is weak because from a general bad character inferred from the misconduct, it must further be inferred that the witness has a specific propensity to lie and further that he is in fact lying on the stand.

When the witness is the defendant in a criminal action, he suffers not only from the ordinary prejudice engendered by bad

character evidence, but also from the prejudice created by the obvious relevance of the prior conviction to the question of guilt. The danger is that the jury is likely to consider the accused a person who would commit the crime charged merely because of his past record, or, that, without too much concern for the insufficiency of the evidence, they may think that he is the kind of person who ought to be put away. [See McCormick, Evidence, Sec. 43 at p. 93 (1954); 1 Wigmore, Evidence, Sec. 194 at p. 646, 3rd Ed. (1940)].

> "We need not dwell upon the substantial prejudicial effect of evidence of defendant's prior offenses in a criminal case." People v. Haston, 69 A.C. 237, 251 (Aug. 1968).

Thus, the offer of such evidence under the cloak of credibility creates "substantial danger of undue prejudice." (cf. Cal. Evid. Code, Sec. 352.)

It is true that the jury may be instructed that evidence of a prior convic-

tion is limited to the issue of credibility. The limiting instruction, however, does little good. (See McCormick, Evidence, Sec.43 at p. 93.) Recent jury studies conducted by the University of Chicago indicate that jurors almost universally fail to limit evidence of prior convictions to the issue of credibility despite limiting instructions from the judge. (See authorities cited in 70 Yale L.J. 763, at 777, Note 89.)

More and more courts are recognizing the inadequacy of limiting instructions which request that jurors disregard the obvious and exclude it from their minds. See discussion and cases cited in Bruton v. United States, 88 S.Ct. 1620; Jackson v. Denno, 378 U.S. 368; see also People v. Aranda, 63 Cal. 2d 518, 524-26, 528-31 (1965).

The defendant in a criminal action who has a prior felony conviction therefore faces a dilemma. If he testifies, he suffers the substantial danger that his prior conviction will be used against him on the question of

guilt. If he does not testify, "his silence alone will prompt the jury to believe him guilty." (McCormick, Evidence at p. 93).

In People v. Haston, 69 A.C. 237, 251, the California Supreme Court held that, although it was within the sound discretion of the trial court to admit evidence of other offenses to prove identity,

> "that discretion must in all cases be exercised within the context of the fundamental rule that relevant evidence whose probative value is outweighed by its prejudicial effect should not be admitted."

This fundamental rule also applies to evidence of other offenses offered for impeachment.

The United States Court of Appeal for the District of Columbia Circuit has developed a rule of judicial discretion to exclude impeachment by prior conviction.

In Luck v. United States, 348 F. 2d 763

(1965), after reversing a conviction on other grounds, the Court of Appeals stated that upon retrial:

> "The trial court is not required to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case.* There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases

* The statute 14 D.C. Code #305 (1961) -- is virtually identical to Calif. Evid. Code Sec. 788.

where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. This last is, of course, a standard which trial judges apply every day in other contexts; and we think it has both utility and applicability in this field.

In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction."

[Luck v. United States, 348 F. 2d 763, 768-769 (footnotes omitted).]

In Brown v. United States, 370 F. 2d 242 (1966), the Court of Appeal reversed

a conviction on the ground that the trial court had abused its discretion in ruling that the defendant could be impeached by a prior conviction. The Court found what it called "a classic illustration of a case in which 'the prejudicial effect of impeachment far outweighed the probative relevance of the prior conviction to the issue of credibility.'" (Brown v. United States, supra, 370 F. 2d at 245, quoting from Luck v. United States, 348 F. 2d 763, 768.)

In Brown, a defendant charged with assault with a dangerous weapon did not testify after the trial court ruled that he could be impeached by his recent conviction on a similar charge of assault with a dangerous weapon. To the Court of Appeal this prior was of little probative value on the issue of credibility, but it was very prejudicial on the issue of guilt or innocence. Moreover, there was evidence that shortly before the assault, the defendant had been severely

beaten and he acted irrationally, and thus his own testimony was vital to this defense of unconsciousness.

In the present case, Petitioner should have been permitted to have the benefit of a fair trial on the charge against him, unhindered by any revelation of his criminal past not germane to the pending accusation. If it is unjust and improper, as we contend, to permit the felony conviction to be admitted as evidence of guilt, then it should not have been allowed to enter under the transparent cloak of impeachment. Only a reversal of the cause can furnish the Petitioner the fair trial to which he is entitled.

B

Denial of Due Process and Equal Protection of Our Laws

In the first place, it is axiomatic that in order to survive the application of the Equal Protection concept contained in the Due Process guarantee of the Fifth Amendment to the Federal Constitution, the impeach-

ment of a defendant via a felony conviction must not invidiously discriminate between that individual either threatened with impeachment or so impeached and other non-descripts not so burdened with past felony records. If it were not for the limiting instruction that the felony may be utilized only in evaluating the defendant's credibility as a witness, such an attempt to merely stigmatize an individual so as to lessen his chances of a fair and impartial verdict on present charges would be met with the most severe reproach. In other words, only by establishing some relevancy between the past conviction and the present litigation can the Government constitutionally create two classes of defendants - those whose guilt or innocence is determined by matters relating to the pending cause and those who must suffer the additional burden of hearing their criminal past paraded before the jury.

The next step in justifying the existence

of those two categories of suspected offenders is to exhibit some justifiable rational connection between the fact of a felony conviction and the presumption that this constitutes probative data on the issue of credibility. Finally, it is necessary to assume that the jury -- the trier of fact -- can limit the effect of this testimony without allowing this precious knowledge of the defendants sordid past to seep over into the determination of guilt or innocence in general.

Within the aforegoing format let us proceed to analyze the link, if any, between the existence of a prior felony conviction and the assumption of diminished present veracity. If the fact of a felony record were legislatively stated to be the basis of a permissible inference by the jury that the defendant was untrustworthy, it is clear that the test formulated in Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241 (1943) and clearly in

reign by virtue of Leary v. United States, 89 S. Ct. 1532, 395 U.S. 6 (1969); United States v. Gainey, 380 U. S. 63, 85 S.Ct. 754 (1965); and United States v. Romano, 382 U.S. 136, 86 S. Ct. 279 (1965) would provide the criterion under which the presumption or inference authorized would be judged. That test simply is "that there be a rational connection between the fact proved and the fact presumed." (89 S.Ct. at 1546.) The fact that the assumed nexus between the commission of a felony and the fact of dishonesty is the legislative rationale underlying the impeachment statute, rather than the statute itself, cannot serve to avoid the analysis necessary under Leary, Tot and Co., for to do so would allow a conviction to be affected by a sub rosa policy of a legislative body which, if elevated to a rule of law, could not survive Constitutional objection.

Thus, the relevant question is what evidence is there that the mere fact that a

person has experienced a felony conviction at some point, any point, in his past makes it probable that as a present day witness he is untruthful. Petitioner submits there is none! On the contrary, that this contention is unsupportable is amply attested to by the scholars who have written on the subject (See Section A, supra) and the dearth of empirical findings or an attempt at any by those who seek to preserve the rule. Can this Court in all honesty say that with the alphabetical jungle of the penal law, the mere fact that a crime is classified as a felony is a comment on the veracity of its perpetrator? If not, does a past conviction for narcotics, not involving honesty, mean that that crime tends to prove that the defendant was an unreliable witness in 1969 or 1970? Of course not!

Even if there was an informed legislative basis for this connection, which there is not, can we say that a limiting instruction whereby the jury hears of the awful deed and

considers it for purpose of believing the defendant, but is told to disregard it with reference to his guilt of any contemporary misdeeds, is sufficient to dispel that awful tendency to convict today for what happened in yesteryear. The entire body of law germinated by Jackson v. Denno, 378 U.S. 368 and taking the shape of Bruton v. United States, 88 S. Ct. 1620 and People v. Aranda, 63 Cal. 2d 518 (1965) sets itself squarely against such a contention.

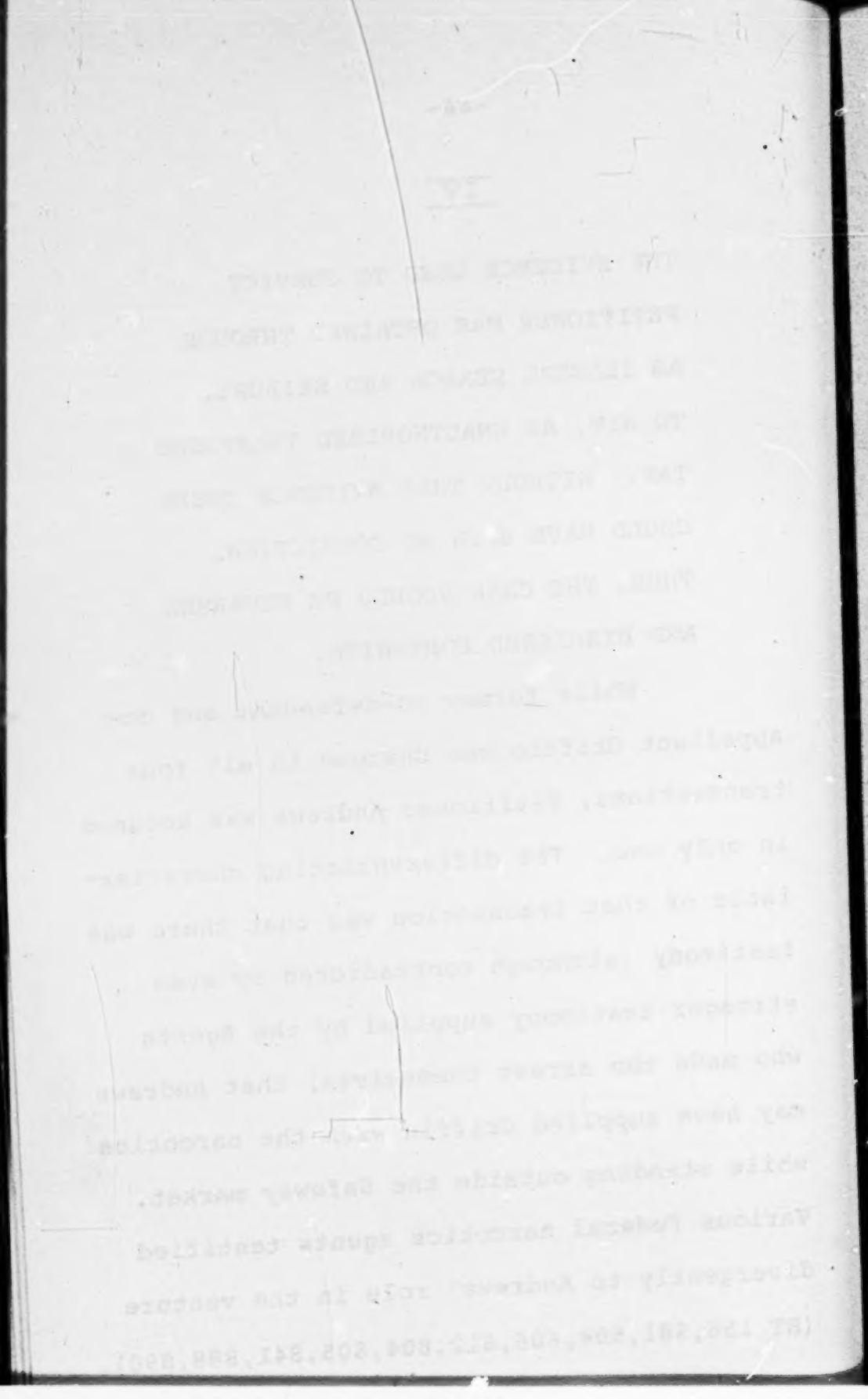
Counsel feverishly maintains that with all of the decisions designed to protect defendants against abuses and potential abuses in recent years, the felony impeachment problem has escaped careful review. In fact, we urge that the resolution of this issue is less troublesome than many of those which have preceded it and been resolved in favor of additional defense prophylactics against an unfair trial. Judge Drucker, formerly of the Los Angeles County Superior Court, a few years ago referred to the pro-

vision allowing the prosecution to impeach a defendant with his past record as the foremost obstacle to a defendant receiving a fair trial. In fact, he cannot, and the time to unearth that ugly principle is via this Court now.

IV

THE EVIDENCE USED TO CONVICT PETITIONER WAS OBTAINED THROUGH AN ILLEGAL SEARCH AND SEIZURE, TO WIT, AN UNAUTHORIZED TELEPHONE TAP. WITHOUT THAT EVIDENCE THERE COULD HAVE BEEN NO CONVICTION. THUS, THE CASE SHOULD BE REVERSED AND DISMISSED FORTHWITH.

While former co-defendant and co-appellant Griffin was charged in all four transactions, Petitioner Andrews was accused in only one. The differentiating characteristic of that transaction was that there was testimony (although contradicted by even stronger testimony supplied by the Agents who made the arrest themselves) that Andrews may have supplied Griffin with the narcotics while standing outside the Safeway market. Various Federal narcotics agents testified divergently to Andrews' role in the venture (RT 156,581,594,606,612,804,805,841,888,890).



The evidence, while admittedly circumstantial, points unerringly to the conclusion that the observations related by the Agents in Court were the product of an unauthorized wiretap. Petitioner sought to have the case dismissed on that ground and such motion was denied (C.T.14).

A brief review of the facts will prove as well as any wiretap can be proved, without a police agent being caught in the act, that telephonic bugging led the agents to the scene of the crime pinned on Petitioner.

Petitioner and Appellant Griffin maintained that Griffin had not told Agent Henry to go to the Safeway Supermarket on April 3rd but had merely told him to follow (RT 318;903). Agent Henry testified that Griffin had told him where they were going and that he then passed the information on to another agent who, in turn, relayed the information to other agents (RT 154). Agent Henry's report included no mention of this relay of informa-

tion,however (RT 277). Griffin testified that she had called her source of supply, David, earlier in the morning and had discussed the arrangements for the transaction, including the ultimate sale at Safeway (RT 318;CT 11). An agent told her at her arrest that her phone had been tapped (RT 318). Agent Carter testified that he had been told after the phone calls made earlier that day that he was to proceed to the Safeway Market (RT 813). He also testified that he had been given information concerning Odell Andrews over the radio (RT 805). Agent Coonce also testified that he had been told to watch Andrews (RT 612). Agent Coonce testified that he did not think there was a radio call to go to Safeway Market. The testimony of Agent Carter substantiates Griffin's explanations in other regards. It is interesting to note that no mention of Agent Carter was made in the official reports (RT 815). The fact that Agent Carter

knew about the rendezvous at Safeway before Griffin disclosed the fact to Agent Henry proves as conclusively as is possible that the information was obtained through the use of an illegal wire tap.

Under Katz v. United States, 389 U.S. 347 (1967), the Fourth Amendment protects a person's private conversations from illegal seizures. See Alderman v. United States, 394 U.S. 165 at 178. The fruits of such an illegal seizure must not be used as the basis for an arrest or search warrant. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Wong Sun v. United States, 371 U.S. 471 (1963); Alderman, supra; Nardone v. United States, 308 U.S. 338 (1939).

The Court said in Silverthorne, speaking through Justice Holmes (251 U.S. at 392):

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court

but that it shall not be used at all."

The 9th Circuit Court of Appeals apparently detected the likelihood of the wiretap (see page 9 of the opinion attached as Appendix "A"). However, the Court concluded that Petitioner had failed to show that the jury based its verdict on the illegal wiretap. Of course, there is no way of knowing the basis of the jury's verdict, but since the crucial witnesses who sought to implicate Petitioner were in a position to do so only because of what they must have learned over the telephone, it is probable that the jury verdict was based on the illegal tap.* Moreover, since the error was a grave constitutional violation,

* See Parker v. Gladden, 385 U.S. 367, 87 S.Ct. 468 (1966) for a case which requires no direct proof of prejudice when the police agents are compromised and specific proof would be impractical to adduce.

the Government must show "beyond a reasonable doubt" that the error complained of might not have contributed to the conviction. See Chapman v. California, 386 U.S. 18, 87S. Ct. 824 (1967); Fahy v. Connecticut, 375 U.S. 85,84S.Ct. 229 (1963).

V.

BY PERMITTING THE TRIAL JURY TO CONVICT PETITIONER OF MANIPULATING HEROIN WHICH, IN ORDER FOR HIM TO BE GUILTY, MUST HAVE IN FACT BEEN IMPORTED INTO THIS COUNTRY CONTRARY TO LAW WITH THE PETITIONER'S KNOWLEDGE, UPON A MERE SHOWING OF POSSESSION IN A FRIEND OR CONFEDERATE IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

Initially let it be known that Petitioner is well aware of this Court's decision in Turner v. United States, 396 U.S. 398, 90 S.Ct. 642 (1970), wherein a majority of this Court concluded that from the fact of mere possession of heroin a Jury was entitled to conclude that the possessor knew that the drug had previously been illegally imported and that it was in fact illegally imported. That judgment by this

Court is in contradistinction to similar answers relating to inferences permissible from the possession of marijuana--namely that knowledge of illegal importation is not a reasonable inference-- Leary v. United States, 395 U.S.6, 89 S.Ct. 1532 (1969) and Turner, itself, which additionally proclaimed that possession of cocaine failed to prove its illegal importation or the accused's knowledge of that fact. See also Erwing v. United States (9th Cir. 1963) 323 F. 2d 674, and generally Tot v. United States, 319 U.S. 463, 63S.Ct. 1241 (1943); Leary, supra; United States v. Romano, 382 U.S. 136, 86 S.Ct. 279 (1965).

It should first be pointed out that there was unrefuted expert testimony adduced proving that heroin could be synthesized from legally imported morphine through the addition of acetic anhydride (RT 297). In the Turner decision, this Court conceded that different empirical data could well outdate the decision (396 U.S. 416, fn.28) and found the question

of possible heroin synthesis open to dispute (Ibid. 412, fn. 16). The only evidence in the present case attested to the fact that synthesis was achievable (RT 297).

Moreover, the Court, in Turner, placed great stress upon the failure of counsel to assert the possibility or likelihood of domestic manufacture of heroin in the thousands of cases hitherto presented (396 U.S. 409-10) but see Bradford v. United States (9th Cir. 1959), 271 F 2d 58,60. However, even if the lack of diligence or foresight by counsel were the test of the validity of the inferences in question here, then Leary could never have been written nor should the Court have reversed the cocaine convictions in Turner.

Mr. Justice Black joined by Mr. Justice Douglas in Turner, after acknowledging the prosecution's clandestine attempt to circumvent proving two indispensable elements of the

crime, as here, by merely proving one, plus a fatuous inference permitted by statute keyed on the fact which this Court recognized in Leary, supra, that even if diligent research could prove that it was probable or even provable beyond all reasonable doubt that heroin was in fact illegally imported this would not suffice to show that a defendant knew it. As Mr. Justice Black stated in his Turner dissent:

> "It matters not to today's majority that the evidence that it cites to show the factual basis of the presumptions was never introduced at petitioner's trial, and that the petitioner was never given an opportunity to confront before the jury the many expert witnesses now arrayed against him in the footnotes of the Court's opinion." (396 U.S. 433)

Thus, Petitioner asks for a re-evaluation of the Turner decision now, since it is out of line with not only Tot, Leary and Romano, but also itself.

CONCLUSION

The Petition for Writ of Certiorari, Petitioner respectfully prays, should be granted and the judgment reversed.

Luke McKissack

LUKE McKISSACK
Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

No. 25,885

GERALDINE GRIFFIN, and
ODELL ANDREWS,

Appellants.

Appeal from the United States District Court for the Central District of California.

Before: BARNES, HUFSTEDLER and TRASK, Circuit Judges.

BARNES: Circuit Judge,

Appellants Griffin and Andrews were convicted under a ten count indictment based upon four sales of heroin during March and April of 1969. Griffin was charged in all counts with violations of either 21 U.S.C. §174 (Concealment and Sale of Narcotics), or 26 U.S.C. §4705(9) (Illegal Transfer of Narcotics). Appellant Andrews was charged only in Count Ten with violating 21 U.S.C. §175 (Concealment and Sale of Narcotics).

Upon a motion by Andrews, appellants' trials were severed and Griffin tried first. Both trials were before a jury and resulted in conviction of each defendant on all applicable counts. A joint appeal was had to this Court. Our jurisdiction for this appeal rests on 28 U.S.C. §1291.

This case is characterized by a long and intricate factual background about which there exists certain conflicts. There is no dispute however, but that Griffin made four sales of heroin which were arranged by an informant, Simmons, to undercover agent Henry. Griffin and other defense witnesse

"EXHIBIT A"

testified that she knew Simmons for three years and that he called her several times over a period of two weeks before the first sale. She claimed that he repeatedly asked her to procure heroin and sell it to him; that she repeatedly refused; that he told her that he was sick and that he would give her a profit on the transaction; and that she continued to refuse his requests until the fourth call.

Simmons, the government informant, and agent Barnes of the Federal Bureau of Narcotics testified that they received Griffin's name from a man named Robert. Simmons stated that he did not recall knowing her previously and that she agreed to make the sale on the day upon which he first contacted her (March 3, 1969).

There is agreement that Griffin called Simmons back on March 3 and arranged to make the sale of "half a piece" of heroin. She met Simmons in a parking lot and he introduced agent Henry as the man who wanted the heroin. Appellant Andrews was observed by agents driving Griffin to the meeting and then to the apartment of her source in his green Cadillac. Agent Henry paid $175.00 to Griffin and received a package of a substance later identified as heroin.

The second sale took place on March 20, 1969. After being informed of a second possible sale, Henry called Griffin and arranged for a meeting at the same place. Griffin testified that she took a bus to the meeting, made the sale to Henry and was driven home. Government agents Barnes and Henry testified that Griffin arrived at the lot in a Mercury and told Henry that she would have to contact her source to obtain the half-ounce of heroin. She made a telephone call and told Henry that the heroin was enroute. Henry claimed that they then discussed a possible purchase

of a pure ounce of heroin for $625.00 in the future. The previously mentioned Cadillac then pulled into the lot and Griffin said, "There is my man now. Wait. I'll be right back." She entered the car and returned a short time later with the heroin. The sale then occurred.

After an abortive attempt to set up a sale on the previous day, Griffin called Henry on March 27, 1969, and told him to meet her that day in a restaurant near the parking lot. She sold him an ounce of heroin for $325.00 and offered to procure three ounces for him in four or five days.

On April 3, 1969, Griffin called Henry, offered to sell him the three ounces of heroin at $625.00 per ounce and told him to meet her at the Midtown Shopping Center. When he met her at the designated place, she told Henry that she did not have the heroin and that her man had it near the Safeway Store on Pico and Fairfax. She then drove to the market in a car rented by Andrews and borrowed from Andrews' common-law wife, with Henry following her in his own car. Griffin testified that she did not tell Henry the location of the second meeting place but, instead, only told him to follow her. She further testified that she called Andrews who was staying near the Safeway Store and asked him to buy her some dog food and wait for her outside the market.

Henry testified that he told another agent at the shopping center that he was going to follow Griffin and informed him of their destination. Agent Carter, who was called to testify as to a handwriting examplar of Andrews, said, however, that he knew that he was to proceed to the Safeway after the phone calls of that morning.

Henry testified that after reaching the market,

both parked their cars and Griffin walked over to his. According to his testimony, she said that she saw her "man" and pointed to Andrews who was standing near to the door of the market. She then walked over to Andrews in front of the store and was handed a large brown grocery bag by him. She then returned to Henry's vehicle and placed the sack on the floor of the car. After handing the heroin to Henry in a rubber condum, Henry got out and gave the signal for the arrests of Griffin and Andrews.

Griffin denied that she pointed to Andrews or called him "my man". She claimed that she walked past Andrews and into the market where she bought cigarettes. While walking out of the market, she removed the heroin from inside her slacks and then picked up the bag from the cart and walked back to Henry's car. She also denied that she handed the heroin to Henry.

Agent Carter testified that Griffin and Andrews walked into the market together. Finally, Griffin testified that one of the agents told her while driving from the arrest that her telephone had been tapped. The government agents denied this.

Because of the large number of contentions which appellants raise upon appeal we will dispose of many summarily, but will discuss the more meritorious claims in some depth.

I. Griffin's Appeal

1. Entrapment as a Matter of Law.

Appellant Griffin maintains that the facts of her case establish entrapment as a matter of law. This defense is found only where the jury could not with reason find otherwise than that appellant was not a person predisposed to commit the crimes of which he stands convicted, but was an otherwise innocent person seduced into the act by

Government agents. Robison v. United States, 379 F.2d 343 (9th Cir. 1967). We need not and do not reach the question of whether the facts elicited in the testimony of the defense witnesses would, if true, constitute entrapment as a matter of law. Our earlier summation of the relevant facts demonstrates that there are definite conflicts in the testimony on the issue of how Griffin began selling heroin to Agent Henry. Under our decisions, the resolution of such conflicting assertions of fact relevant to the entrapment issue is a credibility question for the jury. Robison, supra, at p. 343. In Sherman v. United States, 356 U.S. 369, 373 (1957), the Supreme Court was careful to note that in finding entrapment as a matter of law on the facts of that case, they were "not choosing between conflicting witnesses, nor judging credibility". The case at bar is similar to Notaro v. United States, 363 F.2d 169 (9th Cir. 1966) in many respects. In that case, there were sharp conflicts between the testimony of the appellant and the government informant. We wrote:

> "The credibility of each was put in question, and their demeanor and attitude, not observable to us here, was subject to scrutiny by both judge and jury. When, as here, the result of the trial was so dependent upon the conflicting testimony of two witnesses and when the trial judge refused to disturb the jury's determination in spite of his own expressed leaning toward an opposite conclusion, we cannot interfere." Notaro v. United States, supra, at p. 173, citing Marin v. United States, 324 F.2d (9th Cir. 1963), cert. denied 379 U.S. 806 (1964).

2. Instructions on Entrapment.

Appellant Griffin also contends that the instruction given by the trial court on the entrapment issue is fatally defective in its use of the term "offer". The instruction to which objection is made reads in part:

> "The defendant (Griffin) asserts that she was the victim of entrapment after the crime charged in the indictment.
>
> "Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officers or agents to commit a crime, he is the victim of entrapment, and the law as a matter of policy forbids a conviction in such a case.
>
> "On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government Agents provide what appears to be a favorable opportunity is no defense, but is a lawful entrapment. When, for example, the Government has reasonable grounds for believing that a person is engaged in the illicit sale of narcotics, it is not unlawful entrapment for a Government Agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.
>
> "If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as charged in the indictment, whenever

opportunity was offered or afforded, and that Government officers or agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

"On the other hand, if the evidence in the case should leave the jury with a reasonable doubt whether the defendant had the previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some officer or agent of the Government, then the jury should acquit the accused." (V Reporter's Transcript, pp. 538-39).

This instruction clearly advises the jury that the predisposition required must exist before any offer is made. In addition, repeated offers by Government Agents are not exculpating per se. Many cases have noted that there is a "natural hesitancy of one acquainted in the narcotics trade" to sell. Sherman, supra, at p. 371. In addition, such a test would be far too rigid and mechanical. The inquiry should rather go to the nature and quality of the offer, the relationship of the parties, the overall circumstances and other indicia of inducement or predisposition that those experienced in human affairs would consider in deciding such a question. We find that the instruction given by the trial court requires the jury to consider the relevant factors while channelizing their deliberation within the applicable legal standards and was proper.

3. Submission of Entrapment Issue to Jury.

Griffin also contends that the principles announced in Jackson v. Denno, 378 U.S. 368 in regard to the voluntari-

ness of confessions should be applied to the entrapment issue. More specially, the claim is that submission of the entrapment issue to the jury may result in prejudice to the defendant because they may be reluctant to acquit an admitted law breaker. We express no opinion as to the merits of this contention. The Supreme Court held that this issue is for the jury rather than the court in Sorrell, supra, and this Court has consistently followed that position. See Erwing v. United States, 394 F.2d 829, 830 (9th Cir. 196 Robison, supra, at 346, and Pulido v. United States, 425 F.2 1391, 1393 (9th Cir. 1970).

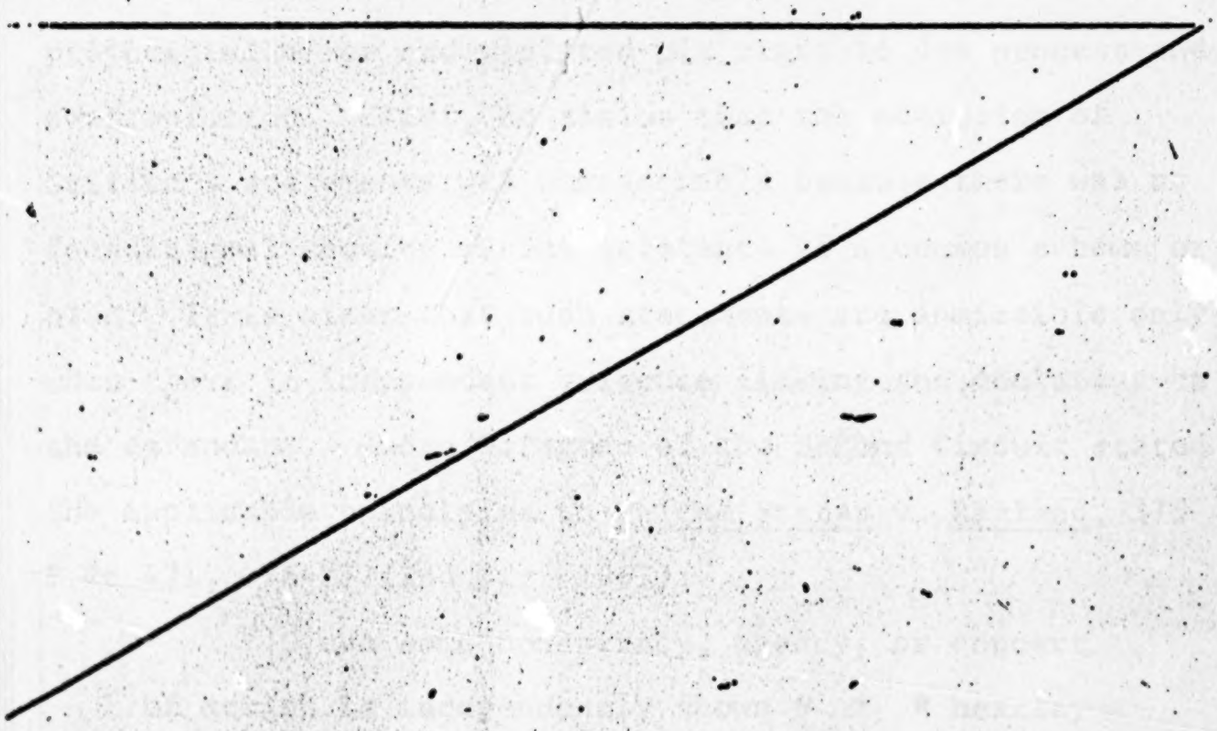
4. Motion for New Trial based on Carter's Testimony.

Appellant Griffin next contends that the trial court abused its discretion by its failure to grant her motion for a new trial after the discovery of testimony given by agent Carter during Andrew's trial. She further contends that the government withheld evidence material to her defense in violation of the principles announced in Brady v. Maryland, 373 U.S. 83 (1967). According to Pitts v. United States, 263 F.2d 809 (9th Cir. 1959), in order to establish sufficient grounds for a new trial based on newly discovered evidence, the defendant must show inter alia, that the new evidence must not be merely cumulati or impeaching, but must be material, and it must be so material that it would probably produce an acquittal. (Id at 810). While Carter's testimony may have contradicted that of other agents in some details and thus have lessened their credibility, its basic thrust was inculpatory. He saw Griffin holding the sack which contained the heroin, and his testimony surely had no probative value on the issue of entrapment. The jury had substantial evidence upon which to

base its verdict against Griffin and we can find no possible effect that Carter's testimony might have had on that verdict.

The only other issue upon which Carter's testimony had effect was in lending some weight to appellants' charge of an illegal wiretap. While his testimony is unclear, Carter seems to have testified that the agents knew they were going to proceed to the Safeway store after the phone calls earlier that day. The other agents testified that they learned of the second meeting place after Henry told one of them in the parking lot that he was going to follow Griffin there. Andrews has failed to show that any evidence upon which the jury based its verdict was the result of the alleged illegal wiretap.

We can dispose of the Brady claim that evidence was withheld more simply. Appellant Griffin puts forward no evidence that the prosecution suppressed the testimony of Carter. The government did not know and had no reason to know that Carter (one of the agents who participated in the arrest), had any evidence of value to relate. He did not prepare a report nor did his name appear in the reports of



other agents on the arrest. If the intent of the prosecutior was to suppress his testimony, it surely would not have produced him to testify on handwriting exemplars at Andrews' trial. In addition to the absence of any purposeful withholding of information, we found above that Carter's testimor was not material either to Griffin's or Andrews' guilt or punishment. (See Brady, supra, at p. 87).

5. The 21 U.S.C. §174 Presumption.

Appellants challenge the trial court's use of the instruction on the presumption in 21 U.S.C. §174 on the grounds that some heroin is domestically synthesized from morphine. The Supreme Court considered this argument in Turner v. United States, 396 U.S. 398 (1970) and upheld the validity of the presumption as applied to the possession of heroin, which is here involved.

II. Andrews' Appeal.

1. Use of Griffin's Statements Against Andrews.

Andrews contends for himself that the use against him of out-of-court statements made by Griffin constituted prejudicial error and violated his right to due process and confrontation. First, he claims that the admission of Griffin's statements was unreasonable because there was no foundational showing of the existence of a common scheme or plan. It is clear that such statements are admissible only when there is independent evidence linking the declarant to the defendant. Judge Waterman of the Second Circuit stated the applicable principles in United States v. Ragland, 375 F.2d 471, 476-77 (2nd Cir. 1967):

> "[O]nce some conspiracy, agency, or concert of action is independently shown * * * hearsay statements made in furtherance of such relation-

ship * * * are admissible. However, the independent evidence need not, as appellant suggests, be so clear and convincing as to compel, absent contradiction, a finding of the fact sought to be proved. [Emphasis in original.]

"The threshold requirement for admissibility is satisfied by a showing of a likelihood of an illicit association between the declarant and the defendant although it might later eventuate that the independent evidence so admitted proves to be insufficient to justify submitting to the jury the issue of defendant's alleged guilty involvement with declarant. If the issue is submitted to the jury it then becomes the function of the jury, not the trial judge, to determine whether the evidence was credible and was convincing beyond a reasonable doubt. * * * In determining preliminary questions of fact relating to admissibility of the hearsay the trial judge has wide discretion * * * and need only be satisfied, if he accepts the independent evidence as credible that that evidence is sufficient to support a finding of a joint undertaking.

"Moreover, the independent evidence of illicit association may be totally circumstantial * * * and may, as here, include evidence of acts of the accused occurring after the time at which the association is alleged to be in existence. Nor is it necessary in this circuit that such independent evidence be inconsistent

with all reasonable hypotheses of innocence, as appellant suggests, either to legitimate its admissibility * * * or to support a conviction. It is true that an association with an alleged conspirator, without more, is insufficient to establish the necessary foundation for the admissibility of the incriminating statements. The accused must "in some sort associate himself with the venture, * * * participate in it as in something that he wishes to bring about * * * (or) seek by his action to make it succeed." [Citations omitted.]

The independent evidence introduced to show the required relationship consists of (1) testimony that Griffin used a car rented by Andrews to make the April 3rd sale, (2) testimony that the green 1968 Cadillac driven by Andrews was used by Griffin during prior transactions and (3) testimony that Andrews gave the paper bag which was subsequently found to contain heroin to Griffin outside the Safeway. This evidence of a common scheme or plan was sufficient to warrant the admissibility of Griffin's out-of-court statement.

Second, Andrews claims that the admission of these statements violates his right to confrontation. Bruton v. United States, 391 U.S. 123 (1967) is not on point because these statements which are made in furtherance of a common scheme are admissible as an exception to the hearsay rule, while the statements in Bruton were not. Nor do statements violate the requirements of California v. Green, 399 U.S. 149 (1970), either. The Supreme Court said that:

"[W]here the declarant is not absent, but is

present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem." (Id. at p. 162).

The record shows that Griffin appeared as a defense witness for Andrews and answered all questions asked. Andrews' attorney asked her neither to affirm nor deny the statements in question. There was full opportunity to confront Griffin but no attempt was made to impeach her out-of-court statemen

Andrews also insists that the instructions on the common plan or scheme were vague and ambiguous as to the correct standard for the burden of proof. It must be remembered that such instructions must be viewed as a whole. The trial court was careful always to make clear to the jury that independent preliminary facts must be found before they could find a common plan or scheme. Furthermore, the proper standard on burden of proof was carefully explained to the jury:

> " * * * Before the declaration of the member of a scheme or plan can be considered by you as evidence against one charged with participating in the common plan, it must be established beyond a reasonable doubt that the plan existed and that the accused was a party to it at the time the declarations were made." (VI Reporter's Transcript, 1039).

Finally, although we are mindful of the danger that a jury, in violation of its instructions, may consider the out-of-court statements as well as the independent evidence in determining the preliminary fact of the existence of a common scheme or plan, we believe that any change in the

allocation of existing functions between judge and jury must await direction from the Supreme Court.

2. Proof of Prior Felony Conviction.

Appellant Andrews' final contention is that the introduction of his prior felony conviction (which conviction was then undetermined on appeal) to impeach his testimony, constituted prejudicial error and a denial of due process. Subsequent to the trial of the case at bar, Andrews' prior conviction on a marijuana charge was reversed on the Leary rationale, and remanded to the trial court for further findings on the issue of knowledge by Andrews of the importation of the marijuana. The trial court vacated the initial judgment and then reimposed the judgment of conviction. This second conviction is presently on appeal. After a conference in chambers on the admissibility of evidence of the appellant Andrews' prior conviction (then on appeal), when the question was asked of Andrews (had he ever been convicted of a felony), there was no objection interposed. [R.T. 959] In United States Hoffa, 367 F.2d 698, 713, 714 (1966), the court stated:

> "An additional reason for finding no prejudicial error in the impeaching question is that Hoffa's experienced and able counsel did not object to the question when it was asked. In fact, in his closing argument to the jury, counsel said: "But the first thing that Mr. Bittmas [government counsel] went to for Mr. Hoffa like, a grip, and it is proper cross-examination -- I didn't object -- 'Are you the James R. Hoffa who was convicted in Chattanooga?'" [Emphasis supplied.] Counsel for Hoffa then told the jury that the Tennessee conviction was on appeal, and the Government's use of it for impeachment purposes indicated a lack of confidence

in both the Tennessee conviction and in the instant prosecution.

"Several of defendants' trial counsel including counsel for Hoffa had previously conferred with the trial judge requesting advice as to his ruling should any former convictions of the defendants be brought out on cross examination. The trial judge informed them that he would permit the Government to bring out the prior convictions on the authority of Empire Packing, supra. It is, therefore, quite apparent from this and counsel's above comments to the jury that counsel for Hoffa deliberately decided not to enter an objection to the impeaching question. We hold that it was not reversible error to ask witness Hoffa if he had been previously convicted." Id. at p. 714.

During the discussion in chambers between counsel and the trial judge, after defendants' counsel had been advised that the court would follow the majority rule expressed in the Circuits and permit the impeaching questions to be asked over defendants' counsel objection, counsel for defendant Andrews restated his several objections to the questions, whereupon there took place that which appears in the margin. 1/

1/ "MR. MARKS; (appellant's counsel) . . . However, I will withdraw those objections if the Court will instruct the United States Attorney that he cannot ask what felony he was convicted of.

"THE COURT: All right. I think that's

Thereafter, the only questions asked of Andrews by the Government attorney was: "Were you ever convicted of a felony?" and "When?" Thus, the failure of counsel to object [R.T. 950] could only have been because of his implied stipulation with court and counsel and was based wholly upon trial strategy, and the advantage thereby gained for his client.

The conviction of each appellant is Affirmed.

1/ Cont'd.

fair enough that he was convicted of a felony without asking him what the charge was.

"MR. WALLIN: (for the government) I would argue, your Honor, that under case law in this Circuit, we are properly allowed to ask, 'have you ever been convicted of a felony?' 'When?' and 'What was it?'

"THE COURT: Well, the cases may support that, but isn't it discretionary in the Court? * * *

(There here followed a colloquy between the Court and the Assistant U.S. Attorney.)

"THE COURT: In view of all the circumstances here, I will allow you to offer the felony as to when it was committed but not the nature of it.

"MR. WALLIN: Very well, your Honor.

"THE COURT: All right."

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, Suite 521, Hollywood, California 90028. On March 6, 1971 I served the within Petition for Writ of Certiorari on the plaintiff and respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

United States Attorney
12 Floor
United States Courthouse
Los Angeles, California 90012

U.S. Court of Appeals
Ninth Circuit
P.O. Box 547
San Francisco, California

Solicitor General
Department of Justice
Washington, D.C. 20530

I declare that the foregoing is true and correct.

Executed on March 6, 1971, at Los Angeles, California.

Barbara Hunter

Barbara Hunter